PD-0445-18
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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JOHNNIE DUNNING
APPELLANT

V.

CCA NO. PD-0445-18
COA NO. 02-17-00166-CR
TRIAL COURT NO. 0632435D

THE STATE OF TEXAS,
APPELLEE

APPEALED FROM CAUSE NUMBER 0632435, IN THE 371st DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE MOLLEE WESTFALL, JUDGE PRESIDING.

APPELLANT'S BRIEF ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW TO THE SECOND COURT OF APPEALS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

INTRODUCTION

This is Appellant, Johnnie Dunning's Brief on the Merits on the State's Petition for Discretionary Review to the Second Court of Appeals in Fort Worth. The Court of Appeals for the Second Appellate District handed down a decision on March 1, 2018. That decision reversed the trial court and ordered that the trial court issue a favorable finding for ***Chapter 64, C.C.P.*** purposes. ***Dunning v. State, 544 S.W.3d 912 (Tex.App. – Fort Worth 2018, pet. granted).***

This Court granted the State's Petition for Discretionary Review on points 3, 4, and 5. Those points this Court granted review on allege as questions:

> Whether the court of appeals properly determined that the post-conviction DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at the time of trial?
>
> Whether the court of appeals gave proper deference to the trial court's determination of historical facts and application=of-law-fact issues that turn on credibility or demeanor?
>
> Whether the court of appeals considered all the evidence before the trial court in making its article 64.04 finding before determining that post-conviction DNA testing results established a reasonable probability that the appellant would not have been convicted had they been available at the time of trial?

STATEMENT OF THE CASE

The State's *Statement of the Case,* State's Brief, Pages 1-2, while generally accurate, leaves out a distinction from other cases wherein the defendant is merely excluded as a contributor to a DNA result.

Appellant agrees that exclusion of a defendant alone by DNA testing is not adequate grounds for relief. The issue is not merely whether there is a reasonable probability of a non-conviction even though the results exclude the defendant as a contributor of DNA. Rather, the issue is whether the trial court's determination is proper when the results *not only exclude the defendant*, but additionally indicate that foreign DNA is present in the relevant area that should not be there. ***Smith v. State, 165 S.W.3d 361, 363-64 (Tex.Crim.App. 200 5)***; ***Solomon v. State, 2015 WL 601877 (Tex.App. – Fort Worth, February 12, 2015, no pet.)(not designated for publication). Solomon, supra,*** holds that the absence of DNA does not indicate innocence. But it also follows *Smith's* logic, holding that the absence of the Defendant's DNA is not important, unless there is ***presence of another person's DNA*** on the item in question. In this case, the and necessary factors all exist: (1) The DNA results obtained exclude Johnnie Dunning; (2) There is foreign, additional DNA present; and finally; (3) The DNA evidence is in the locations that is relevant given the facts of this case.

STATEMENT OF PROCEDURAL HISTORY

Appellant agrees with the facts set out in the procedural history, but would point the following items:

1. On May 20, 2010, a letter from Appellant was received by the trial court and filed. On June 4, 2010, a letter from Appellant was and received in the Tarrant County District Clerk's Office. Both of these letters asked for an attorney for purposes of DNA testing. CR, Pages 102-111.
2. ***Four years later,*** the June 4, 2010 letter to the District Clerk made its way to the Tarrant County District Attorney. CR, Pages 110-111. (Appellant is not taking the position that the Tarrant County District Attorney is at fault for this delay.) The cause of the delay is at this point unknown.
3. On April 30, 2015, the State's lab (Texas Department of Public Safety), issued a report, based on ***Chapter 64, C.C.P.*** testing. This report had no findings of any relevance. CR, Pages 135-142.
4. The State obtained a Non Favorable Finding, which was signed on June 9, 2015. Appellant requested counsel for this hearing, but the judge denied the request. CR, Page 143. RR-Second Supplemental Record June 9, 2015. At that time, a Non Favorable Finding was signed. CR,

Pages 143-144.

5. In several letters, Appellant filed a pro se notice of appeal to the Court of Criminal Appeals [sic], the basis of which was that no counsel had been provided. CR, Pages 145-152.

6. The undersigned counsel was appointed, and filed a motion for new trial. The trial court granted the motion, and the direct appeal on the denial of counsel was dismissed, and DNA testing for the defense was authorized by Judge Westfall. CR, Pages 153-175. ***Dunning v. State, 02-15-00222-CR (Tex.App. – Fort Worth, August 26, 2015, not designated for publication).*** The test results obtained exclude Appellant and indicate that another person's DNA (not the complainant's) is present.

7. The State initially disputed the accreditation of Appellant's DNA lab, Serological Research Institute, "SERI", and the Texas Commission on Forensic Science resolved this matter in its letter dated April 29, 2016. Def. Ex. 10, RR-3 Exhibits, Pages 32-33, admitted at RR-2 February 28, 2017 hearing, Pages 91-99. This matter prolonged the time for testing somewhat.

8. The trial court made a Non Favorable Finding on May 17, 2017 and Appellant filed notice of appeal. The matter before this Court is the

direct appeal of the trial court's Non Favorable finding on May 7, 2017, pursuant to ***Chapter 64.05, C.C.P.*** CR, Pages 370-371.

9. On March 1, 2018, the Court of Appeals decided the merits of the trial court's finding and vacated the trial court's "non favorable" finding and remanded this case to the trial court for an entry of a finding that had the post-conviction DNA test results attained by Appellant been available during the trial of this offense, it is reasonable probably that Appellant would not have been convicted. ***Dunning v. State, 544 S.W.3d 912 (Tex.App. – Fort Worth 2018, pet. granted).***

10. The State's Petition for Discretionary Review was granted and the State timely filed its brief on July 18, 2018. Appellant's brief has been timely filed.

11. Given that this case would require a habeas hearing to resolve actual innocence matters, or final relief for DNA testing purposes, the only issue before this Court at this time is whether Appellant showed that there was a 51 per cent chance that if the evidence of the DNA testing had been available at the time of trial, that Appellant would not have been convicted.

ARGUMENT

The review of a trial court's ***Chapter 64, C.C.P.*** ruling is de novo. See ***Asberry v. State, 507 S.W.3d 227, at 228 (Tex.Crim.App. 2016).*** Appellate courts give almost total deference to the [trial] court's determination of issues of historical fact and application-of-law-to-fact issues that turn on credibility and demeanor, while we review de novo other application-of-law-to-fact issues. ***Rivera v. State, 89 S.W.3d 55, 59 (Tex.Crim.App. 2002)***.

The Courts of Appeals have authority to consider the sufficiency of the evidence as well as other grounds of appeal for post-conviction DNA-testing motions. ***Whitfield v. State, 430 S.W.3d 405, 407 (Tex.Crim.App. 2014); Glover v. State, 445 S.W.3d 858 (Tex.App.-Houston [1st Dist.] 2014)***.

In this case the gist of the State's contention is that the DNA on the victim's shorts could have come from anywhere and is therefore not relevant. RR-2, Hearing, July 6, 2017, Page 18, Line 19 to Page 19, Line 20.

The State maintains, with no factual basis, that while there is DNA evidence on the victim's shorts, that evidence could have come from anywhere and not necessarily from a perpetrator that is not Appellant. The State claims that the evidence is also low level and therefore not reliable.

Dr. Bruce Budowle, the State's expert, testified at the February 28, 2017 hearing that there could have been extraneous sources for the foreign DNA, but he had no evidence to base this on, only his conjecture. February 28, 2017 hearing, RR-2, Pages 87-89. Ironically, the State objected to consideration of and presentation of evidence that it claimed was beyond the scope of whether the scientific evidence was favorable or not. February 28, 2017 hearing, RR-2, Pages 9-11, 15-22; and July 6, 2017 hearing, July 6, 2017, RR-2, Pages 44-47.

Contrary to Dr. Budowle's assumptions, the evidence presented at the February 28, 2017 hearing reflects that the chain of custody ***was neither contaminated or improper.*** There was a valid chain of custody. The Texas Department of Public Safety Crime Lab tested the relevant portions of the evidence and sexual assault kit. Amy Lee, the analyst at Serological Research Institute,"SERI, Appellant's DNA lab, only tested those same items. Def. Ex. 3, SERI report; Def. Ex.9, Pages 8-11, specifically page 11. Both of these exhibits were admitted at the February 28, 2017 hearing. RR-2, Page 40 and 21, respectfully.

The victim neither bathed nor changed clothing prior to the collection of the shorts by the police. These facts were introduced into evidence and were not controverted by the State. Specifically, Defendant's Exhibit 9, Pages 41-42 indicated that the victim was told not to bathe. The sexual assault exam, Defendant's Exhibit

7 (sealed), Page 4, indicates that the victim had not bathed/showered, and did not *changed clothing, as the police had told him.* These exhibits were admitted at the February 28, 2017 hearing, RR-2, Pages 19-22.

Dr. Budowle's unequivocal testimony, which is the ultimate issue in this matter, in the February 28, 2017 hearing, is as follows:

> Q. But the fact of the matter is you don't have any dispute that this little boy's underwear has both his DNA on it and got somebody else's DNA on it, right?
>
> A. I don't dispute that, no.
>
> Q. And that somebody else's DNA is not Johnnie Dunning's?
>
> A. I don't dispute that no.

[February 28, 2017 hearing] RR-2, Page 99, Lines 13-22.

Dr. Budowle's only disputed a corollary finding of SERI, by Ms. Amy Lee, Appellant's lab expert. It was concerning Ms. Lee's opinion that the complainant was or was not excluded in sample 4-3. (SERI Conclusion 5.) Dr. Budowle testified that Ms. Lee should have looked below SERI's stochastic threshold in making her determination as to whether the complainant should have been excluded, something the State says she should ***not*** do when excluding Johnnie Dunning as a contributor, and then finding another unknown person's DNA profile, which was neither

Appellant's nor the victim's.

The inquiry of sample 4-3 has nothing to do with whether Appellant was excluded and someone else's DNA was present. February 28, 2017 hearing, RR-2, Pages 44-46. Appellant was excluded at items 4-4 and 5-2 as the major and minor contributor. February 28, 2017 hearing, RR-2, Pages 48-49. This is a different and distinguishing argument than just one requesting relief because *Appellant's DNA alone* was not present. Someone else's DNA, who was not the victim's, is present.

Given the nature or the location of where the DNA swabs were taken from (State's lab's choice), the existence of foreign DNA (two persons' DNA, neither are Appellant's), the evidence should be sufficient to warrant a favorable finding.

Thus: (1) The DNA results obtained exclude Johnnie Dunning; (2) There is foreign, additional DNA present; and finally; (3) The DNA evidence is in the locations that are relevant given the facts of this case.

This is why Appellant should have relief in this case.

Subsequent to the filing of the State's Petition for Discretionary Review on April 27, 2018, and Appellant's Reply, filed May 3, 2018, this Court handed down the unanimous, published decision in ***Ex Parte Kussmaul, (No. WR-28,586-09, June 6, 2018), designated for publication.***

This Court granted the State's Petition on June 20, 2018, two weeks later.

In ***Kussmaul, supra,*** Judge Newel, writing for the unanimous Court, noted at the outset that of the four applicant's, only one, Kussmaul, had pled not guilty, but the other three persons had not only pled guilty, but had testified against Kussmaul at his trial. Appellant submits that the State places too much emphasis and gives too much credit concerning Appellant's guilty plea. Appellant pled guilty pursuant to a plea agreement. It was followed by the trial court, and an appeal was allowed from the denial of a pretrial motion. That pretrial issue was whether another person, Lorne Clark, a convicted sex offender, step father of the victim in this case, and presently in jail with two new charges for sexually assaulting two other children in the same home as the victim, might have been the actual offender. This issue was preserved and affirmed on appeal, and discretionary review was denied. ***Dunning v. State, 02-99-00311-CR (Tex.App. – Fort Worth, February 22, 2001, not designated for publication)***. At no time did Appellant claim his plea was involuntary, rather, his decision to plead guilty *on the day of trial* was as a result of the denial of being able to present his strategy that another person might have been the perpetrator. February 28, 2017 hearing, RR-2, Pages 14-17.

A portion of the first paragraph of ***Kussmaul, supra***, which is not mentioned in the State's brief, reads as follows:

> "Post-conviction DNA test results exclude all four men as contributors to the semen collected from the crime scene, but reveal the

> genetic profiles of two unidentified men. Long, Pints, and Sheldon now recant their inculpatory statements to the police and their testimony at Kussmaul's trial, and the trial court recommends that we grant relief on Article 11.083 and actual innocence grounds. We agree that the are entitled relief under Article 11.073 based on the discovery of new scientific evidence, but disagree that they have proven they are actually innocent." Kussmaul, at Page 3.

Kussmaul, supra, was a proceeding that was a combined habeas and Chapter 64 hearings. This case is not. Appellant has not filed a habeas matter in this case, but filed a pro se request for DNA testing. The request, made in 2010, and lost for four years, finally mysteriously surfaced, and Appellant, without counsel after requesting same, was handed a denial of a favorable review by a visiting judge. Appellant filed a pro se appeal of that matter, and the undersigned counsel was appointed on direct appeal of the ***Chapter 64, C.C.P.*** denial.

After setting aside the judgment on denial of counsel grounds, Judge Westfall graciously allowed a DNA test, the results of which showed there was foreign DNA present, that did not belong to Appellant or the victim. This DNA was in a relevant area. Finally, after a discussion of Appellant's DNA lab's credentials, this case had its first of two dates for a hearing in February, 2017. A rehearing was conducted in July of 2017, but as in the first hearing, Appellant was not allowed to present virtually any fact of relevance, as the State's position was that those matters were not relevant in DNA testing post conviction matters.

The State asserts that when a record is silent on the reasons for a trial court's ruling or there are no explicit fact findings that have been requested, an appellate court may imply the necessary fact findings supporting the ruling if the evidence, viewed its most favorable light, supports those findings, citing ***Williams vs. State, 513 S.W.3d 619, 630 (Tex.App.–Fort Worth 2016, pet.refused)***, State's Brief, Pages 6-7.

In response, Appellant would suggest that the trial court's reasons are contained in the record and were incorrect. Specifically, at the motion for rehearing, on July 6, 2017, the trial court stated:

> "But for a Chapter 64 hearing, the inquiry is DNA that exculpates someone, and exclusion isn't necessarily an exculpation unless we – it's a – a sample taken from a rape victim that contains sperm." New Trial Hearing, RR-2, Page 36.

The proper standard in ***Chapter 64, C.C.P***. is not exculpation, rather, it is whether if the testing results had been available at the time of trial, is it reasonably probable that the person would not have been convicted. The defendant must prove that had the results of the DNA test been available at trial, there is a 51 per cent chance that the defendant would not have been convicted. ***Glover v. State, 445 S.W.3d 858, 861 (Tex.App – Houston [1st Dost.] 2014 pet.ref'd.)***.

The DNA results obtained exclude Appellant at all areas of testing and in the areas that the Texas Department of Public Safety deemed appropriate. The fact that there is or is not sperm in a sexual assault kit in a relevant area should not be

controlling.

There is foreign DNA present that is not Appellant's and belongs to someone else, per the SERI testing and Dr. Budowle's testimony.

Appellant submits that his case is exactly in the same posture and should have the same result as the *Kussmaul* appellants. Relief should be granted on ***Art. 64 C.C.P.***, but several issues are present that while not necessarily relevant in an ***Art. 64 CC. P***. inquiry, they are relevant in an actual innocence inquiry. In a subsequent habeas matter, this Court may not be willing to make the actual innocence determination and instead remand the case for a new trial for the same reasons as in ***Kussmaul, supra***. This Court could provide some guidance to streamline this process. Nevertheless, the matters are:

(1) The State's position that since SERI's DNA process uses an additional cycle, it is somehow not as accurate and susceptible to misinterpretation.

(2) In its Petition for Discretionary Review, page 17, the State averred that James Oliver was the initial outcry adult witness, and includes this testimony from the original trial/plea in its petition. The State has attached the trial court's record concerning Appellant's plea, which also discusses Allen Beavers. Contrary to the assertion that Appellant was initially identified, Beavers was the original suspect, not Appellant. This

is also noted in the Hearing on February 28, 2017 hearing, Defense Exhibit 9, Page 41 (pages unnumbered) Also in Exhibit 9 is the initial description that the assailant had ***facial hair*** as well. The victim's description included a description of a "big black man with a beard and mustache". Allen Beavers is listed as having a goatee and mustache, Appellant has no facial hair. This person was pointed out by the victim to James Oliver (W3), who in turn provided that description to the police as a black male, 5'11", 220 pounds, goatee and mustache, wearing beige slacks, blue and white stripe shirt and a ball cap. Janette and Lorne Clark, the victim's parents recognized this initial, first description as that of Allen Beavers, who lived in the apartment complex. Def. Ex 9, Page 41 (pages unnumbered). Thus, the State's assertion that the victim initially identified ***Appellant***, on page 17 of its Petition for Discretionary Review is not true. The victim identified Allen Beavers.[1]

(3) Lorne Clark, the victim's father, while in jail on his own sexual assault charges, wrote Judge James Wilson (predecessor to Judge Westfall),

[1]It appears that the testimony is not actually a part of the record on appeal. However, it is a part of this case and probably should have been considered, and Appellant does not object if this Court considers this record. The State included this as Exhibit D to its Petition for Discretionary Review. On page 26 of that record,, the name of the perpetrator initially was Allen Beavers, not Appellant.

stating that he had never seen Appellant. Clark's letter states "The only time I met Johnnie Dunning is in the tank hear [sic] in jail." Def. Ex. 1, July 6, 2017 hearing, RR-2, Pages 13-14, 48-51; RR-3, Pages 5-6. Either Clark was originally talking about Allen Beavers instead of Appellant, or he was lying. Either way, the letter should have been disclosed to Appellant's trial counsel, which it was not.

These matters would be more appropriately addressed in an ***Art. 11.07 C.C.P.*** hearing, with live testimony to consider not only the DNA findings, but Brady issues, the reason that Lorne Clark told Judge Wilson he never met Johnnie Dunning when in fact Clark directed the police to Dunning, Allen Beavers' and/or Lorne Clark's DNA if obtainable, and actual innocence claims. Relevance in a wider scope would certainly be appropriate at that time.

Appellant would suggest that a ***Chapter 64, C.C.P.*** hearing inquiry is synonymous to a CEDIS DNA hit or a police officer's portable breath test unit used at a traffic stop. Both of these procedures establish probable cause for a further inquiry to a confirmatory lab test or a search warrant.

The Court of Appeals' decision is consistent with this Court's decision in ***Smith v. State, 165 S.W.3d 361, 363-64 (Tex.Crim.App. 2005)***. In ***Smith,*** this Court held that the testimony by the victim indicated that seminal fluid was left by the attacker

rebutted the State's argument that even if the DNA does not match Smith, he could still be guilty because the attacker may not have left behind any seminal fluid because the victim in ***Smith*** testified that there was seminal fluid left *by the attacker*. In this case, Appellant is alleged to anally sexually assaulting the victim. The DNA shows someone else's DNA was present in relevant places in the inside back of the victim's shorts, which is completely different than Appellant's DNA simply not being present, with no other finding. The Court of Appeals decision does not conflict with decisions of this Court.

The Court of Appeals decision is also consistent with a previous decision of its own. ***Solomon v. State, 2015 WL 601877 (Tex.App. – Fort Worth, February 12, 2015, no pet.)(not designated for publication). Solomon, supra,*** is authority that the absence of DNA does not indicate innocence, unless there is ***presence of another person's DNA*** on the item in question.

This logic is not inconsistent with the idea that exculpatory DNA testing results are irrelevant when DNA testing is not relied on or there is no physical evidence connects the defendant with the crime. ***Glover v. State, 445 S.W. 3d 858, 862 (Tex.App.–Houston [1st Dist.] 2014 pet.ref'd.); Ewere v. State 2017 WL 5559585 (Tex.App. November 16, 2017) (not designated for publication***).

Kussmaul, supra, is relevant, unanimous, recent and controlling.

PRAYER

Appellant Prays that the State's Petition for Discretionary Review be denied and the judgment of the Second Court of Appeals be affirmed.

Appellant Prays for a favorable finding for ***Chapter 64, C.C.P.*** purposes.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I certify that a true copy of Appellant's Brief on the State's Petition for Discretionary Review was electronically delivered to the office the Criminal District Attorney of Tarrant County, Texas, 401 W. Belknap St. Ft. Worth, Tx. 76196; the State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711, and mailed to Appellant, on the date indicated by the electronic file stamp.

/S/ WILLIAM H. "BILL" RAY
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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Rule 9.4 (e), of the Texas Rules of Appellate Procedure because it has been prepared in a conventional typeface no smaller than 14 point for text and 12 point for footnotes. It complies with the word count limitations of Rule 9.4 (I) because it contains 4343 words, excluding any part exempted by Rule 9.4 (I)(1), as computed by WordPerfect, the computer software program used to prepare this document.

/S/ WILLIAM H. "BILL" RAY
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